In Conversation with an International Commercial Law Expert: Dr Bolanle Adebola on her Choices and the Complexities of Corporate Insolvency Law

By:

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To mark the 2020 International Women's Day, Afronomicslaw celebrates Dr Bolanle Adebola's brilliant contributions to corporate insolvency law. Dr Adebola is a Lecturer in Law at the University of Reading and Convenor, Commercial Law Research Network Nigeria. Her thought-provoking research has generated robust discussions in Nigeria and the United Kingdom.

Afronomicslaw (A): Can you please tell us about your research?

Bolanle Adebola (BA): I research on corporate insolvency law, specifically considering how to develop effective corporate rescue systems. You will find

across the globe that there has been a move towards having rescue systems as opposed to systems that lead to the liquidation or destruction of companies that are in trouble or that are troubled. Corporate rescue systems simply refer to the processes through which companies that are unable to pay their debt can be rehabilitated, or at least the businesses that they run can be preserved to continue providing value within the economy. The kinds of value that preserving such a company or business would contribute to the society include providing employment, contributing to taxes, providing access to a wide variety of goods or services which improve competition and choice, as well as giving entrepreneurs the motivation to try again if they fail. Having companies or businesses also contributes significantly to the general social and economic wellbeing of the communities where they are located. However, from time to time, companies fall into financial trouble. The challenge for corporate insolvency lawmakers is to ensure that the legal systems support the companies or businesses that can survive, to navigate the hopefully temporary challenges that they face.

In the United Kingdom (UK), the most topical aspect of corporate insolvency law or its corporate rescue ambit is the prepack and it is the area on which I have been writing: ‘how to ensure that we provide an effective oversight system for prepack rescue.’ A prepack is short for a pre-packaged administration. It is essentially an abridged administration. Administration is the main rescue procedure in the UK. It accounts for most of the rescues that we have in the UK. From 2002/2003 we started to see a growth in prepackaged administration. The key differences between the pre-packaged administration and the full or traditional administration are transparency and inclusion. In the traditional administration, the various stakeholders contribute to decision making. In the prepack variant, the weaker creditors as a group tend to be excluded from the negotiations and only become aware of the prepack after it has been completed. There are reasons why the prepack is conducted in this way. The lack of consultation has been said to enable the parties to make decisions very quickly, while the lack of transparency is said to prevent premature dismantling of the supply/customer chain and help retain key employees. Both the lack of transparency and inclusion have been said to contribute towards the preservation of these distressed businesses.

The important question is whether the value that we get from excluding these stakeholders should trump the value that we should have as a society in having procedurally just systems that reflect the values that we espouse as a society. These are the areas that I have been writing on and that I find interesting.

A: How did you get involved in this complex area of the law?

BA: My first interaction with corporate insolvency law was when I had just finished my undergraduate studies in Nigeria. My father, who is a lawyer, had a case on liquidation. He assigned me a project on this case, which required me to undertake some research. The Nigerian liquidation system is appended to the Nigerian Company Law. We still have a fusion of company law and corporate insolvency law. I enjoyed company law very much and was happy to get the experience. What stood out the most for me was the impact that the failure of the company that we were researching had on the lives of its employees. The devastation that they faced could not be quantified. By the end of the process, some had lost their lives, many could no longer afford to send their children to the same schools, many had been forced to move homes, those who were the sole breadwinners for their families saw a massive drop in their purchasing power and their places within social circles. If you want to see how people's lives can change overnight, just take a look at company failures and their impact on employees.

At the time, I did not know what corporate insolvency law was. I just researched the liquidation question, while my dad looked for ways in which to recoup not only unpaid remuneration but crucially pensions and gratuities. As you know, Nigeria has no safety welfare. We were looking at complete loss here. One of the issues that my dad and I often discussed during the case was the fact that there was the opportunity to save or preserve something of the business - as we described it at the time - but it appeared that there was no political will. In addition, there was no effective system in Nigeria to create such an outcome.

When I got to the UK to undertake a Master's degree, a year later, I studied corporate finance, within which we studied security; in particular, charges. As we analysed the role and effectiveness of the two types of charges, I was introduced to the UK's insolvency law system. It is at insolvency that the

effectiveness of a charge becomes important. It is the effective charge-holders who tend to make up the senior creditors and become those who would be included in the case of a pre-pack. Those without charges would be the weaker creditors that are excluded from pre-pack decision-making.

It was within the context of my Master's degree that I was introduced to the notion of corporate rescue. I remember the first time I heard about administration. I recall thinking to myself, perhaps if Nigeria had administration, we might have applied that to rescue or save the company and business in 'my first' liquidation case. I decided to write my Master's thesis on the comparison between the options available to a distressed company in Nigeria and those available to a distressed company in the UK. My dissertation supervisor thought that it was an excellent project and encouraged me to develop my ideas further. So, I decided to undertake a PhD. I was fortunate to have been supervised by Professor Ian Fletcher, who was the doyen of corporate insolvency law in the UK and one of the most recognisable names in corporate insolvency law across the globe.

A: You have written ground-breaking articles, including "Common Law, Judicial Precedents and the Nigerian Receivership Procedure" **and "**Proposed Feasibility Oversight for Pre-Pack Administration in England and Wales: Window Dressing or Effective Reform?**" What informs your scholarly interventions?**

BA: It depends. The earlier pieces I wrote focused on the rescue system in Nigeria, such as the 'Common Law' paper, while the latter pieces have focused on the rescue system in the UK. That is also a timeline of my research trajectory. When I started, as I mentioned, I was trying to solve Nigeria's problems. When I thoroughly examined the Nigerian rescue system, I found that there were two main options available within the law. One is schemes of arrangements, and the other is the receivership system. One interesting feature of the Nigerian system for me was that it was misunderstood both within Nigeria and outside its borders. Within Nigeria, the Nigerian receivership system was read like a direct transplant of the system in England and Wales. It was in the process of trying to explain to colleagues that the Nigerian receivership system was a modification or an improvement of the system

received from the British, that I wrote papers like 'The Duty of the Nigerian Receiver to 'Manage' the Company' and the 'Common Law' paper indicated above. The former was written to show that the Nigerian receiver had a broader role than her British counterpart, while the latter was written to show how the courts misinterpreted receivership in our locus classicus. I was happy to see that the Supreme Court ultimately redirected itself.

As my research developed, I realised that the questions we were grappling with in Nigeria, which we thought that we would find answers to in the UK through comparative studies, could not be answered through comparative analysis because even the UK had not resolved those questions either. These questions, including juggling multifaceted principles and values, go right to the heart of any rescue system, including those of the UK and the UK was scrambling for answers too. For that reason, I started to write more about the core of corporate rescue; asking more principled questions and using the UK system as a case study because it was also in the middle of the heated debates on the directions that its law should take. By 2013/2014, I was asking 'what is corporate rescue as a concept?' 'how do we grapple with it?' I came to the conclusion that it was a vague concept. No one really can answer what is in or out. Business rescue, company rescue, both are rescue. The question was how to create effective systems that work for the cross-section of stakeholders involved when a company fell into financial trouble.

By 2015, I got enmeshed in the raging debate in the UK on pre-packs. The Government had just investigated the prepack that I talked about at the start and introduced reforms. I published my opinions that the reforms were ill-advised and would fail because my research goes all the way back to the 1830s when the US rescue system was created. Unknown to most people, the United States (US) has experimented a fair bit. The 2015 UK reforms had been tried before in the era of the New Deal in the US (post-great depression) and had failed. Hence, weaving comparative and doctrinal methods, I explained that the reforms ignored the future survival of the entity, which required a careful look at financial and economic rehabilitation, as well as a compulsory approach to oversight. By 2018/2019, the voluntary and limited approach to oversight had clearly failed. I was sad to note that the Government's decision had failed. I guess I could say that my choices of topics have been influenced by the

questions that I have been trying to find answers to.

A: In addition to Professor Ian Fletcher, which other scholars have inspired your research, and why?

BA: To start with, I cannot praise Professor Fletcher enough for giving me the space to make certain kinds of arguments during my PhD. The one thing he urged me to do was to be temperate in the delivery of my points. Corporate insolvency law is incredibly emotive. While encouraging the original and often distinctive ideas that I had, he would ask me: what is the evidence for this? Strengthen your evidence, be moderate in your delivery.

I have had other inspirations. One of them has just ended her bid for the Democratic nomination in the on-going Democratic Party Presidential primary contest in the US. She is Senator Elizabeth Warren. Senator Warren started as a researcher and lecturer on corporate insolvency law (or bankruptcy law, as it is called in the US). She championed the empirical approach to corporate insolvency law research. She delivered her points in clear, easy to follow language. Essentially, she made corporate insolvency law a real-life issue. It was not merely about some greedy people. It was about real-life people and had real-life effects on everyday people. Thus, the changes to the law had to be balanced and carefully considered to avoid unintended consequences. She challenged the libertarian order of the day through her approach. I was just enthralled. Other scholars that have inspired my research include Senator Warren's frequent co-author, Professor Jay Lawrence Westbook and another empiricist, Professor Lynn LoPucki. Also, interestingly, those who challenged her opinion like Professor Douglas Baird and Professor David Skeel. The UK also has very interesting insolvency scholars, many in the younger generation that have been seeking to create a theory of corporate rescue. If I started the list, we won't finish this interview.

A: What advice would you have for younger scholars interested in insolvency law?

BA: The important thing about research is to find something you are motivated to write about. For me, no matter how bored I am on any day, once I pick up an insolvency law text, my mood improves; I find myself smiling. Find an aspect of

the law that you are keen to research. When it comes to insolvency law, I do not think that the central question on insolvency law has been resolved. The central question is still how to allocate control powers and how to create a system that is fair and balanced for the stakeholders. Since the 19th century, when the world's most renowned formal rescue system was introduced in the US, the same questions have been asked repeatedly. Whether you examine the bankruptcy law of the US as sophisticated as it is, or the corporate insolvency law of the UK, which is growing in its influence, or the laws across the rest of Europe, Africa or Australia, we are all asking the same questions. Each jurisdiction brings an answer or makes a contribution to that knowledge, such that you are not disadvantaged by asking this question within a particular context. Pick a jurisdiction that you are happy with, pick an aspect that you are happy with and formulate research questions through which you can contribute to knowledge.

It does not matter the context that you pick. This brings me back to Nigeria. At the beginning of my research, I started by considering my core questions from the Nigerian perspective. One of the points I noted was that the Nigerian insolvency system and the receivership system, in particular, had been criticised as being anomalous. For example, World Bank reports described the Nigerian receivership system as anomalous. The Nigerian system was only anomalous to the extent that it was not a direct replica of that of the UK. What Nigeria had done with its receivership procedure was to revise the negative impacts of receivership found in the UK law. UK receivership focused on the interests of secured lenders, say banks, who appoint the receivers. The Nigerian receiver was supposed to go beyond the interests of the secured lenders, to consider other interests of the company. If the Nigerian receivership system had been employed effectively to actualise the intention of its drafters, as at 1988, it would have been doing what the UK only came to do in 2002/2003.

It is incredible to find that when law diffuses across borders, the changes made by some jurisdictions are received better than those that are made by others. If I were to pick another UK rescue law that has diffused across borders, I would pick administration. Administration, when created in 1986 in the UK, had been an in-court procedure, when it was diffused to Australia, it became an out-of-

court procedure. By 1999/2000, when the UK was looking to modify administration, it took some of the changes that had been made in Australia and created both an in-court administration system and an out-of-court administration system. The question, therefore, is why was it that when Nigeria modified receivership, it was called anomalous, but when Australia modified administration, it was ground-breaking and an improvement on knowledge. Perhaps the answer lies in the way even Nigerians portrayed and practiced the Nigerian version of receivership. In 2020, we are now trying to transplant administration into Nigeria, which really is laughable.

Each researcher should ensure that they thoroughly investigate the context in which they are interested, map it on to the broader knowledge in the area and then provide answers that can be understood across board. I encourage and challenge young Nigerian researchers to develop an understanding of the literature and broader issues so they can see that comparative law does not answer normative questions. Once they are able to do this, the young researcher can contribute to the improvement of corporate insolvency systems across the globe.

A: You organised the historic inaugural Commercial Law Research Network Nigeria (CLRNN) conference at the University of Reading in September 2019, could you tell us more about this?

BA: CLRNN is a platform established to enable knowledge exchange amongst experts interested in the development of commercial law in emerging countries of African extract. I chose Nigeria as a case study given its economic and political position on the continent. The reasons for its creation follow from some of those just discussed above. As a young researcher from Africa engaging in comparative analysis, I was led to believe that the best way to develop our laws was to always make recommendations for our system by drawing from so-called advanced nations. Partway through my PhD, I realised that some of the people I was referencing did not understand the intricacies of the issues. Many of the laws that were diffused into the Nigerian sphere failed to match the realities of the Nigerian situation. Furthermore, as Senator Elizabeth Warren has done, I realised that we needed to look closely at the srealities of our circumstances and apply methodologies and methods that resolve the challenges of our contexts. Also, that we can contribute to global knowledge

through this path.

I felt that a way to do this was to create a forum in which we could really encourage the investigation of our realities and share this knowledge. Thus, CLRNN has its conference and methodology workshop that brings together top-rate Nigerian researchers to discuss amongst one another and also creates an opportunity for younger researchers to mingle with and create lasting links with their older counterparts. The research methodology workshop enables us to discuss research challenges and potentially collaborate to develop methods and methodologies that best suit our context. At the very least, to discuss how best to apply methods and methodologies appropriately. We also have the stakeholders' conference that seeks to influence the direction of the law by bringing together researchers, lawmakers, regulators, judges, business-people and practitioners to discuss policies, reforms and the Nigerian reality to collaboratively create solutions. While we are predominantly Nigerians, we do not consist entirely of Nigerians. CLRNN is open to anyone with interests in developing commercial law that is fit for Nigeria, as a prime example of an emerging economy from Africa. It has been highly commended but I think this is because of the attitude that participants have brought to it.

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